Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of	)	
	)	
Implementation of the Non-Accounting Safeguards of Sections 271 and 272 of the Communications Act of 1934, as amended;	)	**CC Docket No. 96-149**
	)	
and	)	
	)	
Regulatory Treatment of LEC Provision of Interexchange Services Originating in the LEC's Local Exchange Area	)	

COMMENTS OF AT&T CORP.

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Summary

The NPRM seeks comment on two sets of regulations that would apply if and when a BOC becomes authorized to provide interexchange services that originate in a state within its region. First, the NPRM seeks comment on how it should interpret and implement the separation, nondiscrimination, and related provisions of Section 272 of the Telecommunications Act of 1996, which are designed to mitigate the potential that the BOC will abuse any residual market power it may then possess to engage in anticompetitive acts of discrimination and cost misallocation. Second, the NPRM asks whether and to what extent BOC long distance affiliates should be subject to the Commission's dominant carrier regulations.

While Section 272 cannot effectively prevent all discrimination and cost misallocation, the adoption of comprehensive regulations, and their strict enforcement, could nonetheless prevent or deter the most blatant forms of misconduct that would otherwise likely occur. The structural separation requirements, for example, prohibit the integrated provision of exchange and interexchange services by the BOC or its affiliate, both because such integration would be inherently discriminatory and because it would create joint and common costs that would be easily susceptible to misallocation. Section 272(b)(1)'s requirement that the BOC and any interLATA affiliate "operate independently," and the more specific additional requirements of the rest of Section 272(b), should thus be implemented through the imposition of the structural separation requirements of Computer II

(including a prohibition on the ownership, purchase, or operation of exchange facilities by the BOC affiliate), and through other regulations described in more detail in these comments.

The related nondiscrimination requirements of Section 272(c) and 272(e) are designed to prevent the BOC from discriminatory acts that disadvantage its competitors by, for example, differentiating between affiliated and unaffiliated entities in the timing or quality of its exchange or exchange access services, effectively charging its affiliate lower prices for these services, failing to share information with nonaffiliates, discriminating in the development of new services that are needed by interexchange carriers, or engaging in a myriad of other types of misconduct. The Commission should adopt regulations broadly implementing these requirements, and should narrowly construe the few statutory exceptions to them. In particular, the Commission should expressly foreclose any BOC attempt to claim that Section 272(e)(4) would permit it to use newly or previously constructed interLATA facilities to act as a wholesale supplier of interexchange facilities and services to its affiliate and to other resale carriers.

The NPRM further seeks comment on the joint marketing restrictions of Section 272(g). The Commission should issue regulations enforcing Section 272(g)(1)'s requirement that any marketing opportunities available to the affiliate be likewise made available to any unaffiliated carrier on the same terms and conditions. The Commission should also make clear that the joint marketing provisions do not permit the BOCs (or other LECs) to

disregard the equal access requirements which continue in effect under Section 251(g), and which mandate that BOCs provide a customer signing up for local service with his or her long-distance options in a completely neutral way.

Finally, the NPRM also seeks comment on whether and to what extent dominant carrier regulation should be applied to the BOC's interLATA affiliate. Because the BOCs' market power in the local exchange gives them market power in the interexchange market, they are dominant and should be so classified. Not all aspects of dominant carrier regulation, however, are relevant to the specific risks of monopoly leveraging raised by BOC interexchange entry and, conversely, the prospect of such entry requires the adoption of additional regulations. The classification of BOC affiliates as dominant or non-dominant therefore should not obscure the central issue in this proceeding: what combination of regulatory safeguards should be established in light of the market power they possess. However they are classified, the BOCs and their interexchange affiliates should be subject to advance tariff filing and cost support requirements, stringent separate affiliate and non-discrimination requirements, and periodic reporting requirements addressed more fully in the body of these comments.

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COMMENTS OF AT&T CORP.

Pursuant to Section 1.415 of the Commission's Rules and its Notice of Proposed Rulemaking released July 18, 1996 ("NPRM"), AT&T submits these comments on the nonaccounting safeguards and related regulations that would apply to provision of in-region interLATA services by the Bell Operating Companies ("BOCs").

INTRODUCTION

In this NPRM, the Commission has sought comments on two sets of regulations that would apply if and when a BOC is hereafter authorized under § 271 of the Act to provide interexchange services that originate in one or more states in its region. First, the NPRM seeks comments on the regulations that should be adopted to implement the separation, nondiscrimination, and related provisions of § 272 of the Act, which are designed to protect against BOC uses of any residual market power that they then possess to engage in discrimination or cost misallocation that harms interLATA competition and customers. Second, the NPRM seeks comment on whether and to what extent the BOC separate interLATA affiliate

that would provide long distance services should be subject to price cap and other regulations applicable to dominant carriers.[1]

Although no BOC has obtained or could now obtain interLATA authority, the consideration of these issues is not premature. A BOC application for in-region interLATA authority must demonstrate, among other things, that it would comply with the requirements of § 272 and the Commission's implementing regulations (see § 271(d)(3)). Accordingly, it is necessary and appropriate for the Commission to adopt regulations in advance of the time of any possible applications under § 271.

At the same time, addressing these issues and the question of whether BOC affiliates should be classified as dominant requires some degree of speculation, for it is unclear precisely what conditions will exist if and when a BOC is authorized to provide originating interLATA services in any individual state or states in that BOC's region. However, the range of possibilities is sufficiently clear that the Commission may consider these issues in a reasoned way (although these rules, like any other, would have to be reassessed to the extent that conditions end up varying from those assumed in the rules).

Most pertinently, it is clear that, at the time of any interLATA entry, a BOC cannot have the statewide exchange and

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[1] Although among the issues encompassed by the Notice (¶¶ 153-159), the question of the appropriate regulatory treatment to be afforded the provision of long-distance service by SNET, GTE, and other independent LECs has been deferred to a separate pleading cycle. AT&T will address that issue in its separate comments to be filed August 29, 1996. See Extension Order, Implementation of the Non-Accounting Safeguards of Sections 271 and 272 of the Communications Act of 1934, CC Docket 96-149, DA 96-1281 (August 9, 1996).

exchange access monopolies in its service areas that the BOC had at the time the Telecommunications Act of 1996 was passed. In particular, the Act does not permit interLATA relief to be granted merely upon the implementation of the structural separation and nondiscrimination safeguards that are required by § 272 of the Act. Congress recognized, as did the MFJ before it, that BOCs have the incentive and ability to use local monopoly power to discriminate against competitors and cross-subsidize the BOCs' competitive offerings in ways that are immune to effective control through these or any other such regulatory safeguards. See NPRM, ¶¶ 7 -14.

The Act thus precludes any relief unless and until the Commission not only finds that the BOC would comply with the § 272 safeguards, but also finds (1) that there are competing exchange carriers in the State who offer effective competitive alternatives to residential and business customers "exclusively over their own telephone exchange service facilities" or "predominantly over their own telephone exchange service facilities in combination with resale," and who have interconnection agreements that fully implement § 251(c) of the Act and a detailed supplemental "competitive checklist"[2] and (2) that BOC entry would serve the public interest. §§ 271(c) & (d)(3). Notably, that public interest finding could be made only after the Commission gives "substantial weight" to the Department of Justice's evaluation

[2] Section 271(c)(1)(B) of the Act would have also permitted applications to be granted under a different standard if no such interconnection agreements had been requested in a particular state -- as has not been the case.

under the competitive standard it considers appropriate, which can be the standard of the MFJ or of other antitrust laws.[3]

Conversely, at the time of any BOC entry, the BOC could retain some residual power over interLATA services and the ability and incentive to use exchange facilities to disadvantage interexchange carriers. The competitive local exchange carriers in the state need only offer service "predominantly" over their own facilities (such that up to 49% of BOC lines in a state might have no facilities-based alternatives), and the legislative history of § 271 provides that the alternative facilities that exist might not constitute the kind of "fully redundant network" that the BOC possesses.[4] Moreover, it is possible that the FCC or the Department will err in its assessment of the extent to which the alternative carriers' facilities and interconnection rights would sufficiently constrain BOC behavior to make their entry consistent with the public interest. Further, insofar as conditions are assessed on a state-by-state basis, a BOC can obtain relief in one state while it or its affiliates retain monopoly power in a second state, and there are a myriad of ways in which a BOC can use exchange and exchange access monopolies in one state to obtain

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[3] Section 271(d)(2); Joint Explanatory Statement of the Committee of Conference, H.R. Rep. No. 458, 104th Cong., 2d Sess. 149 (1996) ("Conference Report").

[4] Conference Report, p. 148.

illicit anticompetitive advantages in providing interLATA services in a second state.[5]

It is because of the possibilities that a BOC would enter interLATA services while it possesses residual market power that Section 272 requires that, for at least the first three years after interLATA authority is granted, a BOC comply with specified nonaccounting separation and nondiscrimination requirements discussed herein (as well as accounting requirements that are subject to a separate NPRM). The requirements of Section 272 are stated in strict and categorical language. They prohibit, for example, all forms of discrimination (see § 272(c)(1)), not merely "unreasonable" discrimination[6] (see 47 U.S.C. § 202(a)), and require full "operat[ional] independen[ce]" between a BOC and its affiliate (see § 272(b)(1)). While the Commission has previously proposed and experimented with non-structural safeguards in its Computer III enhanced services regulations, the 1996 Act rejects

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[5] For example, such a BOC has the ability to misassign long distance costs in one state to exchange operations in a second. Similarly, the fact that interexchange carriers operate nationally means that they will be required to disclose to that BOC (in any state where it has an exchange monopoly) competitively sensitive information about the interexchange carrier's national plans to roll out new services. The BOC would then be able to use the information for competitive gain in any other state where the BOC has interLATA authority.

[6] Cf. First Report and Order, Implementation of the Local Competition Provisions of the Telecommunications Act of 1996, CC Docket 96-98, ¶ 217 (August 8, 1996) (Because the "nondiscrimination requirement in section 251(c)(2) is not qualified by the 'unjust or unreasonable' language of section 202(a), [w]e [] conclude that Congress . . . intended a more stringent standard").

that approach, and mandates comprehensive structural separation and stringent nondiscrimination requirements in this different context.

The Commission should now adopt strict, implementing regulations that give full effect to the terms as well as the purposes of § 272. See 47 U.S.C. § 154(i) (allowing any regulation that is "not inconsistent" with the Act). While such safeguards could never effectively prevent all anticompetitive discrimination or cross-subsidization, the combination of these separation and nondiscrimination requirements could, if strictly interpreted and enforced, prevent or inhibit blatant forms of misconduct that likely would otherwise occur.

Moreover, the need for the Commission to enforce these requirements according to their letter and spirit is accentuated by the many scenarios already being floated by the BOCs for evading them. The BOCs have, for example, raised proposals to establish the BOC affiliate as a purportedly "competitive" local exchange carrier not subject to Section 251(c) of the Act, and to allow their affiliates to use newly constructed or previously constructed BOC "official services" or other long distance networks that are integrated with monopoly exchange networks in precisely the ways Sections 271 and 272 seek to prevent. Any regulations adopted by the Commission should be sufficiently broad and detailed to anticipate and foreclose these and similar tactics.

AT&T's comments are divided into four sections. Part I of these comments addresses the questions raised in the NPRM concerning the scope of the Commission's Section 272 (and 271) authority over specific interLATA services. NPRM, ¶¶ 9 - 44.

Part II discusses the specific regulations that are required to implement Section 272's separation and nondiscrimination requirements (and the provisions of § 271(h)) (NPRM, ¶¶ 55 - 89), including the enforcement provisions. NPRM, ¶¶ 94 - 97.

Part III addresses the issues raised by provisions of § 272(g) that allow a BOC and its separate affiliate to engage in joint marketing under certain conditions (and by the not unrelated provisions of § 271(e)(1) that applied to large interexchange carriers). NPRM, ¶¶ 90 - 94.

Part IV addresses the elements of dominant carrier regulation that should apply to a BOC's separate interexchange affiliate (NPRM, ¶¶ 130-152).

I. SECTION 272 AND THE COMMISSION'S RULES IMPLEMENTING IT APPLY TO ALL INTERLATA SERVICES AND INTERLATA INFORMATION SERVICES

The NPRM has raised several questions concerning the scope of § 271 and § 272 and whether and to what extent the § 272 requirements apply or can be applied to intrastate services, international services, incidental interLATA services, interLATA information or enhanced services, or interLATA services of a prospective merger partner.

A. Intrastate InterLATA Services

The Commission is correct in tentatively concluding (¶¶ 20-29) that its authority to promulgate rules under Sections 271 and 272 encompasses both interstate and intrastate interLATA services and interstate and intrastate interLATA information services. The statute defines "interLATA service" as

"telecommunications between a point located in a local access and transport area and a point located outside such area" (See § 3(42)), a definition which applies to both intrastate and interstate services so long as they cross a LATA boundary. Moreover, as the NPRM notes (¶ 22), Sections 271 and 272 apply by their terms to all interLATA services, and the statute's terms permit no distinction between interstate and intrastate interLATA services. The only geographic boundaries relied on by these provisions are the LATA and the location of a State in relation to a particular BOC's region (i.e., whether the State is in-region or out-of-region). See 47 U.S.C. § 271(a)-(b), (d).[7]

The Commission is likewise correct in concluding (¶ 26) that Section 2(b) of the Communications Act does not preclude the Commission from applying its rules to intrastate interLATA service. Courts have uniformly held that Section 2(b) cannot be read to negate the Commission's express regulatory authority under other provisions of the Act,[8] and the restrictions imposed by Sections

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[7] The Commission incorrectly suggests (¶ 25), however, that in the event the 1996 Act were construed to apply to interstate interLATA services only, the BOCs would be free to provide intrastate interLATA services without restriction. To the contrary, if intrastate interLATA services were not subject to Sections 271 and 272, then the MFJ would continue to prohibit the BOCs' provision of such services. See Section 601(a)(1). In any event, the District Court vacated the MFJ in its entirety, with the concurrence of all parties, because it properly read the provisions of the 1996 Act as supplanting the MFJ in all respects, both interstate and intrastate.

[8] For example, courts have held that Section 2(b) cannot be read to nullify the Commission's explicit authority under Section 2(a) and the provisions of Sections 201 through 205 of the Act to establish rules governing interstate services, even when those rules unavoidably preempt inconsistent state regulations directed
(continued...)

271 and 272 expressly extend to all interLATA services. Moreover, the explicit provisions of the subsequently enacted Sections 271 and 272 would impliedly repeal the provisions of Section 2(b) even if they could otherwise be found applicable (see NPRM, ¶ 26).

The Commission recently adopted this same analysis in holding that the provisions of Section 251(c) of the Act are fully applicable to intrastate services, notwithstanding Congress's failure to create express exceptions to Section 2(b).[9] These holdings are fully applicable to Sections 271 and 272 as well.

B. International Services

The Commission correctly concludes (¶ 32) that the separate affiliate and nondiscrimination provisions of Section 272 will apply to a BOC's provision of both domestic and international interLATA telecommunications services that originate in that BOC's in-region States. Section 272(a)(2)(B) states that the separate affiliate requirement applies to "[o]rigination of interLATA telecommunications services." The definition of "interLATA service" in the 1996 Act, in turn -- "telecommunications between a point located in a local access and transport area and a point located outside such area" (see § 3(42)) -- plainly encompasses all services, both domestic and international, that cross a LATA

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[8] (...continued)
at intrastate services or the facilities used to provide them. California v. FCC, 39 F.3d 919, 931-33 (9th Cir. 1994); PUC of Texas v. FCC, 886 F.2d 1325, 1333-1335 (D.C. Cir. 1989); NARUC v. FCC, 746 F.2d 1492, 1498-1501 (D.C. Cir. 1984); see Louisiana PSC v. FCC, 476 U.S. 355, 375-76 n. 4 (1986).

[9] See First Report and Order, Implementation of Local Competition Provisions in the Telecommunications Act of 1996, CC Docket No. 96-98, ¶¶ 83-103 (released Aug. 8, 1996).

boundary. 47 U.S.C. § 272(a)(2)(B). Consequently, any provision of in-region interLATA telecommunications service by the BOCs is subject to the requirements of Section 272 and the safeguards adopted in this proceeding, regardless of whether the service is domestic or international.

C. Incidental InterLATA Services

The NPRM (¶ 37) also asks about the Commission's regulation of incidental interLATA services. Although Section 272(a)(2)(B)(i) exempts all but one incidental interLATA service from the separate affiliate requirements of Section 272,[10] the Commission nonetheless is empowered by other provisions of the 1996 Act to impose safeguards to prevent anticompetitive behavior by the BOCs with respect to the provision of such services. Specifically, Section 271(h) requires the Commission to "ensure" that a BOC's provision of incidental services "will not adversely affect telephone exchange service ratepayers or competition in any telecommunications market." Section 254(k) imposes a general requirement that a carrier may not use non-competitive services to subsidize competitive services, and requires the Commission to establish "any necessary cost allocation rules, accounting standards, and guidelines" to prevent unreasonable allocations of

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[10] The exception is the provision of a service that permits a customer in one LATA to retrieve stored information from, or file information for storage in, facilities in another LATA. Such a service is an interLATA information service subject to the separate affiliate and nondiscrimination requirements of Section 272. See §§ 271(g)(4), 271(h), and 272(a)(2)(C). To the extent any BOC was providing any such service prior to the enactment of the Act, it has one year in which to bring that service into compliance with Section 272. See § 272(h).

joint and common costs to services included in the definition of universal service. § 254(k).

Although the Commission is not required to impose separate affiliate requirements for the provision of incidental interLATA services,[11] it should, at a minimum, adopt nondiscrimination obligations and nonstructural safeguards that would reduce the risks to ratepayers and competition arising from the BOCs' provision of such services. The exemption of such activities from the separate affiliate requirement of Section 272(a) was not meant to permit the BOCs to discriminate or cross-subsidize with respect to those services, as Sections 271(h) and 254(k) make plain.

Accordingly, the nondiscrimination obligations of Sections 272(c) and 272(e) should apply to a BOC's integrated provision of incidental interLATA services, including, for example, that (1) facilities, services, and information concerning exchange and exchange access offerings should not be made available for the provision of an incidental service unless such facilities, services, and information are made available to other providers on the same terms and conditions; (2) ordering, provisioning,

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[11] The broad authority conferred by Sections 254(k) and 271(h) would give the Commission the power to require the creation of a separate affiliate in a particular case where the Commission finds such creation is necessary to reduce the risks of "adverse effects" on consumers and competition or cross-subsidization. Although Section 272(a)(2)(B)(i) exempts incidental interLATA services from the otherwise-applicable general requirement that interLATA telecommunication services be conducted by an affiliate, the exemption does not preclude the Commission from requiring creation of a separate affiliate on a case-by-case basis pursuant to Sections 254(k) and 271(h).

installation and maintenance intervals concerning exchange and exchange access services should be no greater for other providers of these services than for the BOC; and (3) the BOC should be required to impute to its price for its incidental services an amount for use of its exchange and exchange access services no less than what it would charge others for the same use of those services. These requirements can and should be enforced through the same type of nonstructural safeguards that the Commission has employed in the past, including network disclosure, accounting and cost allocation rules, and reporting requirements. Computer III (Phase I Order), 104 F.C.C.2d 958 (1986); see also Part II.B, infra (discussing nondiscrimination requirements).[12]

D. InterLATA Information Services

As the Commission tentatively concludes (¶ 42), the Act's definition of "information service" (see 47 U.S.C. § 153(20)) is similar to what the Commission has defined as "enhanced services" (see 47 C.F.R. § 64.702(a)), although the terms are not identical.[13] The separate affiliate requirement expressly applies

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[12] The Commission separately seeks comment (¶¶ 34, 38-39) on the extent to which some "previously authorized activities" under Section 271(f) may not be subject to the separate affiliate requirements of Section 272. To the extent the Commission determines that the separate subsidiary requirements of Section 272 would not apply to certain of the activities described in Section 271(f), it should make explicit that such an exemption would apply only so long as such activities are, as specified by Section 271(f), provided "subject to the terms and conditions contained in" an order of the MFJ Court.

[13] For example, the Commission correctly concludes (¶ 54) that "live operator" telemessaging services is included within the meaning of Section 3(a)(2)(41)'s definition of information services (as it was under the identically worded provision of the MFJ), but (continued...)

to all interLATA information services, and makes no distinction between interLATA information services that originate in a BOC's region and those that originate outside a BOC's region. The application of the separate affiliate requirement to interLATA information services is an essential requirement because, among other reasons, information services are often provided as adjuncts to interLATA services, and there can be significant substitutability between many interLATA information services and interLATA services. If interLATA information services were not subject to the requirements of Section 272, it would be exceedingly difficult to maintain the integrity of those requirements as applied to interLATA services generally.

The Commission also seeks comment (¶¶ 43-47) on how it should distinguish interLATA information services from intraLATA information services. An information service is interLATA whenever interLATA transmission or interLATA access is a component of the service[14] -- as the BOCs have stated it "almost invariably" is and will be.[15] An interLATA transmission, in turn, occurs whenever

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[13] (...continued)
the definition of "enhanced services" is limited to "computer processing applications" (47 C.F.R. § 64.702(a)).

[14] See United States v. Western Elec. Co., 907 F.2d 160, 163 (1990).

[15] See Motion of the Bell Companies for a Waiver of the Interexchange Services Restriction to Permit Them to Provide Information Services Across LATA Boundaries, pp. 7-8 & Aff. of Jerry A. Hausman ¶ 19 (App. A, Tab 1), United States v. Western Elec. Co., No. 82-0194 (D.D.C. filed Apr. 24, 1995) ("Regardless of the network used, major information service providers almost invariably arrange interLATA access as an essential element of the information service network.")

there is "telecommunications between a point located in a local access and transport area and a point located outside such area" (see Section 3(42)).

In that regard, an information service is not interLATA merely when it can be accessed from outside the LATA in which the computer facility is housed -- for example, by a customer using his or her own presubscribed long distance carrier. Whether such a service will be interLATA or intraLATA will depend upon how the BOC structures it (see NPRM, ¶ 45). For example, to the extent the BOC uses centralized computers and a foreign exchange (FX) line, other private lines, or 800 service to enable its customers to communicate with computers in other LATAs (without using the customer's presubscribed or independently selected interexchange carrier), then the information service would be interLATA.[16]

The Commission also seeks comment (¶ 54) on the proper treatment of telemessaging. As the Commission tentatively concludes (id.), telemessaging services (i.e., voice storage retrieval and live operator information services) are an information service,[17] so when interLATA access or transmission are

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[16] See United States v. Western Elec. Co., 907 F.2d 160, 163 (D.C. Cir. 1990). The Commission can also presume that if an MFJ waiver was previously sought or granted for the provision of a particular information service, that service is an interLATA information service. See NPRM, ¶ 46.

[17] See United States v. Western Elec. Co., 673 F. Supp. 525, 563-65 (D.D.C. 1987), aff'd in part, reversed in part, 900 F.2d 283 (D.C. Cir. 1990); Petition for Emergency Relief and Declaratory Ruling Filed by the BellSouth Corporation, 7 F.C.C. Rcd. 1619, 1623 (¶ 20) (1992).

components of the service, they are subject to the requirements of Section 272 as well as those of Section 260.

E. Mergers

At the present time, it does not appear that any BOCs which have proposed to merge their operations are providing interLATA telecommunications service in the region of their prospective merging partner. However, the Commission is correct (¶ 40) that if such mergers are completed, the in-region states of the merged entity will include all of the in-region States of each BOC involved in the merger, for purposes of Sections 271 and 272. The 1996 Act defines a BOC as "any successor or assign of any such company that provides any wireline telephone service." 47 U.S.C. § 153(4)(B). Thus, upon completion of the merger, any provision of interLATA service by a merging BOC in the region of another merging BOC would constitute in-region interLATA service subject to the requirements of Sections 271 and 272.

Moreover, as the Commission notes (¶ 40), once two or more BOCs enter into a merger agreement, a merging BOC has the incentive and ability to discriminate in favor of the interLATA affiliate of the BOC's prospective merger partner that is offering service in that BOC's in-region area, regardless of whether the merger has received all necessary regulatory approval. Thus, the regions of the merging BOCs should be considered a single "in-region" for purposes of Sections 271 and 272.

II. THE COMMISSION SHOULD ADOPT REGULATIONS THAT FULLY IMPLEMENT SECTION 272'S STRICT STRUCTURAL SEPARATION AND NON-DISCRIMINATION REQUIREMENTS

The NPRM next seeks comment on the regulations that should be adopted to implement the structural separation and non-discrimination requirements of Section 272. The structural separation requirements seek to prevent the BOCs or their affiliates from engaging in the joint and integrated design, planning, construction, or operation of exchange and interexchange facilities that would inherently discriminate against other carriers, and that would permit costs of long distance operations to be misallocated to monopoly services and ratepayers with practical impunity, thereby both cross-subsidizing long distance services and raising the BOCs' rivals' costs. The discrimination requirements are separately imposed because even complete structural separation of a BOC and a long distance affiliate cannot prevent the BOC from anticompetitively favoring its affiliate by discriminating in the timing or quality of its exchange or exchange access services, by effectively charging its affiliate lower prices for these services, by failing to share information with nonaffiliates, by discriminating in the development of new services that are needed by interexchange carriers, by discriminating in inventorying facilities or in providing recording information or billing services, or by engaging in a myriad of other types of conduct.

At the same time, as the NPRM recognizes (¶ 139), such regulatory safeguards can neither prevent nor provide effective remedies against many forms of such anticompetitive conduct in the

pricing, provisioning, and accounting treatment of monopoly exchange facilities -- which is the reason BOCs have heretofore been excluded from interexchange services.[18] For example, they particularly cannot mandate the "cooperation" and "going the extra mile" -- e.g., in developing new services needed by a competitor -- that is essential to maintaining efficient and effective interfaces between local telephone monopolies and interexchange carrier networks. Similarly, until such time as access charges are reduced to their economic cost, no set of regulatory safeguards will be able to require a BOC affiliate to treat access charge payments to affiliates as a real cost and to prevent it from pricing its interLATA services in ways that effect illicit price squeezes.

The combination of strict separation requirements and explicit nondiscrimination requirements can, however, have the potential to prevent or inhibit some of the most blatant forms of discrimination and cross-subsidization that would be inherent products of integrated exchange and long distance operations. But even that cannot happen unless the Commission adopts appropriate regulations that give full effect to the statute's terms and purposes and that foreclose BOC attempts to evade them by transforming narrow statutory exceptions into gaping loopholes

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[18] See, e.g., United States v. Western Elec. Co., 524 F. Supp. 1336, 1344 (D.D.C. 1981); United States v. Western Elec. Co., 552 F. Supp. 131, 167-68 (D.D.C. 1982), aff'd, 460 U.S. 1001 (1983); United States v. Western Elec. Co., 673 F. Supp. 525, 567-79 (D.D.C. 1987), aff'd in part, reversed in part, 900 F.2d 283 (D.C. Cir. 1990); AT&T Opposition to the Four RBOCs' Motion to Vacate the Decree, pp. 52-67 & Aff. of Stephen G. Huels, ¶¶ 12-21 (App. A, Vol. II, Tab 5), United States v. Western Elec. Co., No. 82-0192 (D.D.C. filed Dec. 7, 1994).

(e.g., through claims that § 272(b)(1) allows a BOC to deploy new exchange facilities or capabilities in its separate affiliate or that § 272(e)(4) allows a BOC to become a wholesale supplier of interexchange facilities and services to its affiliate). The remainder of this section sets forth in detail both the specific requirements of Section 272 and the specific regulations that the Commission should adopt to assure that these requirements achieve their purposes.

A. Structural Separation

The fundamental purpose of the structural separation requirements of Section 272 is to prohibit the integrated provision of exchange and interexchange services by the BOC or its affiliate. Such integration would be inherently discriminatory because unaffiliated interexchange carriers would be incapable of similarly integrating their facilities with the BOC's exchange facilities. It would also make cost misallocations and cross-subsidies a certainty by creating a large pool of joint and common costs from which inherently arbitrary allocations would then have to be made. The Act precludes such integration by limiting the BOC to exchange services and the interexchange affiliate to its competitive interexchange services, with the exception of the limited joint marketing permitted by Section 272(g).

Section 272(b) imposes five structural and transactional requirements to effectuate these principles. This subsection of

AT&T's comments addresses those contained in Sections 272(b)(1), 272(b)(3), 272(b)(4), and 272(b)(5).[19]

1. Section 272(b)(1)'s "Operate Independently" Requirement

Section 272(b)(1) establishes the general requirement that the BOC and its affiliate "operate independently," which is then followed by four more specific injunctions that each represent a particular attribute of operational independence -- that there be separate books, separate employees, and separate credit arrangements, and that affiliate transactions be conducted at arms length, reduced to writing, and published. The Commission is thus plainly correct in concluding (¶ 57) that the "operate independently" requirement can be given effect, as it must, only if it is interpreted as imposing requirements beyond the four specific and more limited structural requirements set forth in subsections 272(b)(2)-(5), and that any contrary interpretation that would render Section 272(b)(1) surplusage must be rejected.

The inclusion of the separate "operate independently" requirement establishes at least two governing principles. First, it means that a BOC cannot evade one of the principal purposes of Section 272 -- to prohibit the integration of exchange and interexchange facilities -- through hypertechnical interpretations of the four specific requirements that would fail to create genuine

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[19] Section 272(b)(2)'s requirement that there be separate books, records, and accounts will be addressed in the Commission's separate rulemaking proceeding on accounting safeguards. See Notice of Proposed Rulemaking, Accounting Safeguards for Common Carriers Under the Telecommunications Act of 1996, CC Docket No. 96-150, FCC 96-309 (released July 18, 1996) ("Accounting Safeguards NPRM").